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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 587

ABRAHAM KOSDON, SAM HAUSLINGER AND BENJAMIN LAPINE,
Petitioners,

vs.

DIVERSEY HOTEL CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY TO BRIEF OF SECURITIES AND EXCHANGE COMMISSION.

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STATEMENT.

The reply to the brief of the Debtor may stand as a reply to the brief of the Securities and Exchange Commission, except for the additional matter which it introduced into this record by its statement (p. 6, marginal note 2) that on January 27, 1946 the District Court approved a plan which provides for the sale of the stock interest in the Debtor held by Pearson in trust for the bondholders out of which sale the bondholders will re-

ceive the payment of their bonds and the buyer will assume the reorganization expenses. This statement is inaccurate because the buyer will receive the $140,000 in cash which the Debtor has on hand out of which he will pay reorganization expenses, and the balance will belong to him. The whole thing is *contingent* upon the buyer being able to obtain a guarantee title issued by the Chicago Title and Trust Company guaranteeing the title free and clear from any objections. There should be added to the statement of the Commission that petitioners "have appealed from the order" that respondents moved to dismiss the appeal and the motion was denied.

Having brought this subject matter to the attention of the court, we feel it necessary to quote from our Memorandum of Law in opposition to the motion to dismiss the appeal, the following:

> "The Trustee was authorized under the plan of reorganization which the court approved to sell all of the stock of the corporation to the purchaser of the debtor's property. As a result of such purchase and of the placing of a new mortgage (contingent upon certain conditions) the bondholders will receive 100% on their bonds, plus 6% on the accumulated interest, which will be paid out of $120,000.00, which is in the possession of the trustee and belongs to the bondholders." *
>
> "The objections to the plan were on the ground that *the stock is not owned by the Debtor,* the corporation, but *is owned by the stockholders* and a bankruptcy court *is without jurisdiction to sell the stock which does not belong to the bankrupt.*"

The Memorandum further stated:

> "Section 111 of Chapter X confines the jurisdiction of the court to *'the debtor and its property'*. It does not vest jurisdiction in the Bankruptcy Court of property which *does not belong to the debtor.*

* The fund as of this date is $140,000.00.

Section 114 of the Act confines the jurisdiction of the court under that chapter to be 'the same as in a bankruptcy proceeding upon adjudication'. A bankruptcy court has no jurisdiction in ordinary bankruptcy of the stock which belongs to the individual stockholders and all it may adjudicate is a disposition of the property of the bankrupt.

Under Section 187 of the act, *the trustee is only possessed of the same powers of which a trustee in bankruptcy is possessed.* It is elementary that a trustee in bankruptcy of a corporation is only possessed of the property of the bankrupt corporation and *not of the stock which is owned by the stockholders.*

Article I, Section 216, Subsection 2, dealing with provisions of plan, confines it to *'the property of the debtor'.* No jurisdiction is conferred on the *property* of other persons. Subsection 7(b) provides for a sale of *'such property'* which is limited to the property of *the debtor* and excludes stock which is owned by *someone* else.

Neither under Section 77B nor under Chapter X was the Bankruptcy Court granted the power to deal with property which does not belong to the debtor. (*Re: Commonwealth Building Corporation,* 77 F. 2d, 308, 309; *Clarke* v. *Chase National Bank of the City of New York,* 137 F. 2d 797, 800; *Thompson* v. *Magnolia Petroleum Co.,* 309 U. S. 478).

It is only when a third party has property which is pledged to it *where the debtor has an interest* that a bankruptcy court has jurisdiction for the protection of the bankrupt's property to restrain the sale of the security in order to *preserve the equity of the debtor.* This is not the case here as the corporation has no interest in the stock which belongs *exclusively* to the stockholders.

Under no theory may a bankruptcy court order a sale of stock in a corporation and its jurisdiction is confined to a sale of the property and *not as to those who claim adversely to the corporation* (*Re: Standard Gas and Electric Co.,* 119 F. 2d 658, 661)."

The Memorandum also stated:

"Appellants did contest from the *outset* the 'good faith' of the petitioner in invoking the reorganization proceedings under the subterfuge that it was a reorganization, but actually a *liquidation proceedings.* The court in overruling our contention was evidently of the opinion that a reorganization would result from a plan which may hereafter be submitted. It now appears from the plan that the debtor *will be liquidated.* The approval of such a plan was not adjudicated on the prior appeal.

While tha plan proposes to pay the bonds 100% plus 6% in accumulated interest, the purchaser *will acquire the* $120,000.00 *in cash which is on hand,* so that he is actually paying the interest with the funds on hand, and he is also paying the expense of the reorganization with the funds on hand. *No new money is being added* and it is not the purpose to reorganize the property for the benefit of the bondholders who are also the stockholders. *The purpose is only to liquidate the property.* Such a plan was improperly approved, particularly when the objection was raised at the outset of the filing of the petition and *now the plan demonstrates that the proceedings were initiated for liquidation purposes.* This plan comes within the condemnation by the Supreme Court of the United States (*Marine Properties* v. *Trust Co.,* 317 U. S. 78, 83; *Fidelity Assurance Society* v. *Sims,* 318 U. S. 608, 615; *St. Charles Hotel Co.,* 604 F. Supp. 322, affirmed by 149 F. 2d 645; certiorari denied 66 S. Ct. 48)."

The Memorandum concluded:

"It is evident from the plan that it contemplates a sale not only of the property of the debtor, but also of the stock of the stockholders and *the sale is to be made to the proposed purchaser without competitive bidding.* There is no warrant in the law for the approval of a plan which contemplates a liquidation without competitive bidding.

Section 216(1) of Chapter X authorizes a sale at an 'upset price', but *does not authorize a sale without competitive bids.*

The only theory upon which this sale is predicated is under Section 216 (10). This section authorized an *upset price.* However, the upset price is *not the maximum* but the *minimum* and there *must be competitive bidding.* (Collier on Bankruptcy, Vol. 6, Page 3496 and authorities cited (14th Ed.)).

A sale of all of the stock, which includes the property at an appraised value without competitive bids, and without advertising, *constitutes the taking of the property without due process of law* which is also a prohibition against the bankruptcy court (*Louisville Joint Stock Land Bank* v. *Redford,* 295 U. S. 555)."

The foregoing quotations relating to the plan which was approved tend to support the challenge at the outset of the "good faith", and show that the proceedings were not initiated for reorganization, but for liquidation, and culminated in liquidation which a Bankruptcy Court is without power to execute.

For the reasons stated in the original petition, in the Reply to the Brief of the Debtor, and in this Reply, petitioners urge that the Writ of Certiorari be granted.

Respectfully submitted,

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Attorneys for Petitioners.